

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

WYNN LAS VEGAS, LLC

and

KELI P. MAY, an Individual

Case No. 28-CA-155984

and

KANIE KASTROLL, an Individual

Case No. 28-CA-157203

RESPONDENT WYNN LAS VEGAS, LLC'S ANSWERING
BRIEF TO THE GENERAL COUNSEL'S EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S DECISION AND
RECOMMENDED ORDER

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I. STATEMENT OF THE CASE.¹

This case presented a relatively straightforward scenario involving the discipline of Table Games Dealer Kanie Kastroll and Security Officer Keli May – two current employees of Wynn Las Vegas, LLC (hereinafter “Wynn” or “Respondent”). Additionally, the Administrative Law Judge was called upon to determine the lawfulness of a number of provisions from Wynn’s Code of Personal Conduct, which were parsed, excerpted, and included in the Consolidated Amended Complaint. This Answering Brief is submitted in response to General Counsel’s Exceptions and General Counsel’s Brief in Support of Exceptions to the Administrative Law Judge’s Decision and Recommended Order pertaining solely as to Ms. Kastroll.

On or about December 1, 2015, an order issued consolidating the Charge filed by Ms. Kastroll against Wynn (Case No. 28-CA-157203) with the Charge filed by Officer May against Wynn (Case No. 28-CA-155984). The Consolidated Amended Complaint essentially alleged that Wynn violated Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act (“the Act”) by issuing certain discipline to Ms. Kastroll and Officer May and by maintaining certain policies within its Code of Personal Conduct.

A hearing was held before Associate Chief Judge Gerald M. Etchingham in Las Vegas, Nevada, from February 16, 2016 through February 18, 2016. Three volumes of transcript containing the testimony presented during the hearing were prepared and transmitted to the parties on or about February 25, 2016. General Counsel amended the Consolidated Amended Complaint during the hearing to withdraw Paragraph 5(e) of the Consolidated Amended

¹References in the brief are to the party testifying, the transcript volume, the page of testimony in the transcript, and the relevant transcript lines referenced (*e.g.*, Rankin, Vol. 3 at 452:20-21, 25; 453:1). There are also references to Respondent’s Exhibits (R. Ex. __), General Counsel’s Exhibits (GC Ex. __), Joint Exhibits (Jt. Ex. __), and the Administrative Law Judge’s Decision (ALJD __:__).

Complaint and to exclude the allegation that Wynn improperly surveilled its employees. Durkin, Vol. 2 at 312:5-8. The Consolidated Amended Complaint was further amended to include an allegation that Wynn interrogated employees regarding their union activities in violation of Section 8(a)(1) of the Act. Durkin, Vol. 2 at 312:9-25; 317:21-25; 318:1; Etchingham, Vol. 2 at 318:7-25; 319:1-12. Respondent denies that any actions it took were in violation of the Act.

With respect to the discipline issued to Ms. Kastroll, the evidence clearly demonstrated that Wynn acted lawfully in issuing Ms. Kastroll a first written warning for engaging in a lengthy, one-sided discourse soliciting Security Officer Johnny Moreno to vote “yes” in a then upcoming union representation election while Officer Moreno was actively on work time. Ms. Kastroll’s conduct interfered with the performance of Officer Moreno’s job duties and guest service. Additionally, Ms. Kastroll’s conduct violated Wynn’s Solicitation and Distribution Policy because Officer Moreno was on active duty at Priority One Post when Ms. Kastroll asked him to vote “yes” for the union.

Wynn’s policies and practices strike the lawful balance of avoiding improper and unnecessary interference with the performance of job duties and guest service while employees are on working time, while still allowing employees to freely discuss their personal views, terms and conditions of employment, and any other subject matter while they are not actively on working time. Nevertheless, Ms. Kastroll disregarded Wynn’s reasonable policies and engaged Officer Moreno in a three (3) minute lecture, encouraging Officer Moreno to vote “yes” in a union representation election, while Officer Moreno was actively on duty, surrounded by guests, and stationed at one of the busiest security posts at Wynn.

Notably, when Ms. Kastroll’s conduct was brought to the attention of Wynn, Respondent’s representatives conducted a limited investigation to determine whether Ms.

Kastroll had in fact violated Wynn's policies and procedures. To that end, Wynn's representatives asked limited, tailored questions to the individuals involved in order to determine whether or not Ms. Kastroll's three (3) minute discourse to Officer Moreno was related to work. Wynn's representatives specifically did not discuss the union, whether other employees had reached out to the security officers to discuss the union, or how the security officers intended to vote in the union representation election. Moreover, Wynn's representatives did not attempt to persuade the security officers to vote in the representation election in any particular way.

Ultimately, on September 26, 2016, Judge Etchingham issued his decision and Recommend Order ("the Decision"). Notably, Judge Etchingham found that Wynn acted lawfully in issuing Ms. Kastroll a first written warning for engaging in a lengthy, one sided discourse soliciting Security Officer Johnny Moreno to vote "yes" in a then upcoming union representation election while Office Moreno was actively on working time in one of the busiest intersections at Wynn. ALJD 23:34-42. The Judge also correctly held that Wynn did not engage in any unlawful surveillance or interrogation of employees or their union activities. ALJD 28:28-35; 30:31-40. In view of the overwhelming evidence presented to the Judge and his correct conclusions that Wynn acted lawfully, the Judge's decision regarding Ms. Kastroll should be affirmed and adopted by the Board.

II. STATEMENT OF FACTS AND FINDINGS AS TO KANIE KASTROLL.

A. Wynn's Collective Bargaining Relationships.

Wynn is an employer of choice in Las Vegas, Nevada and strives to implement and enforce policies and procedures that treat employees fairly and that are consistent with its legal and collective bargaining obligations. Tourek, Vol. 2 at 169:10-22. Many of Wynn's employees are covered by collective bargaining agreements. For example, approximately 3,500 Wynn

employees are covered by a collective bargaining agreement between Wynn and the Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226, and Bartenders Union, Local 165 (“Local Joint Board”). Tourek, Vol. 2 at 232:12-13; 233:7-12. Soon after opening in 2005, Wynn voluntarily recognized the Local Joint Board through a card check. Tourek, Vol. 2 at 234:5-9.

The table games dealers, which include Ms. Kastroll, work in Wynn’s Table Games Department and are represented by the Transport Workers Union of America, Local 721 (“the Union”), which was certified as their majority collective bargaining representative on May 23, 2007 after an uncontested Board conducted secret ballot election. Kastroll, Vol. 1 at 35:6-13. That bargaining unit does not include employees in the position of casino service team lead or extra-board/part-time dealers. Kastroll, Vol. 1 at 37:7-17. Notably, in 2010, Wynn was one of the first employers in Las Vegas, Nevada to reach a contract with the Union. Tourek, Vol. 2 at 232:25; 233:1-3. That collective bargaining agreement will expire in 2020.

B. Ms. Kastroll’s First Written Warning.

1. Wynn’s Solicitation and Distribution Policy.

Wynn maintains a written Solicitation and Distribution Policy. GC Ex. 2. The purpose of the policy is to maintain a productive, efficient and clean work environment, as well as to minimize the potential of any disruption to Wynn’s guests. Id. Per the policy, “solicitation by employees is prohibited in work areas *during the work time* of the employee initiating the solicitation or the employee being solicited.” Id. [emphasis added]. Solicitation, for purposes of the policy, is defined as “oral communication asking or seeking a person to take some action, such as buying a product or service, contributing to a charity, or joining an organization. It also includes requests for employees to sign Union authorization cards or representation petitions and

the exchange of such documents for signature.” Id. Notably, General Counsel concedes that Wynn’s Solicitation and Distribution Policy is lawful on its face. See General Counsel’s Brief at 37.

Wynn evenly enforces its Solicitation and Distribution Policy when violations are brought to its attention. In fact, in the past two years, there have been three (3) incidents that resulted in written warnings to employees, including the first written warning that Wynn issued to Ms. Kastroll, which is the subject of this case. Prescott, Vol. 2 at 281:20-25; 282:1-4; GC Ex. 23; GC Ex. 24. For example, Wynn issued a first written warning to an employee after the employee requested that her coworker pay her to help her make a duvet. GC Ex. 23. Similarly, Wynn issued a second written warning to another employee for attempting to sell Avon products at Wynn. GC Ex. 24.

From a broader standpoint, as demonstrated by the evidence and found by the Judge, Wynn also consistently disciplines employees for personal conversations – regardless of content – when such conversations distract other employees from performing their job duties or interfere with guest services and when such conduct is brought to Wynn’s attention. See, e.g., R. Exs. 13-14; Creer, Vol. 3 at 611:20-25; 612:1-23; ALJD 12:34-37; 27:13-16. For example, in the recent past Wynn disciplined employees for such things as: speaking to coworkers instead of serving guests (R. Ex. 14 at 2:11); ignoring security post duties while talking with another employee (R. Ex. 14 at 2:13); ignoring the supervision of games due to conversations with another employee (R. Ex. 14 at 3:16); engaging in a personal conversation about 1970s and 1980s pornography stars that was overheard by guests (R. Ex. 14 at 5:22; 6:24-25); failing to greet a guest because the employee was engaged in a conversation with a coworker (R. Ex. at 7:27); failing to serve guests due to conversations with a coworker (R. Ex. 14 at 8:28, 31); and neglecting duties while

engaged in personal conversations with coworkers (R. Ex. 14 at 12:40, 42, 44).

Notably, Ms. Kastroll is fully aware that she cannot engage in personal conversations with coworkers while on work time when such conversations interfere with guest service. Specifically, Ms. Kastroll concedes she is knowledgeable regarding the fact that, on January 23, 2009, Regional Director Overstreet approved a settlement in Case No. 28-CA-022250 wherein Wynn agreed among other things to not stop its employees from talking about the union during work time while permitting talk about other non-work topics during work time *as long as their conversations did not interfere with or distract employees from the duties and responsibilities to Respondent's customers*. Kastroll, Vol. 1 at 51:4-16; 110:1-10; 112:24-25; 113:1-11.

While Ms. Kastroll attempts to allege that she frequently has non-work-related conversations on the casino floor, she admits that such conversations depend on how busy the casino is and whether it is interfering with guest service. See, e.g., Kastroll, Vol. 1 at 75:11-12 (“All day long depending if we’re busy”); 77:6-7 (“Depending upon if you’re on a dead game with no players – you know, a dead pit with no players...”); 78:3-4 (“You know, if we have a player, we’re going to engage the player”); 100:11-18 (stating that a “dead game” is a game with no customers). In fact, Ms. Kastroll acknowledges that she has been warned on prior occasions to limit conversations. Kastroll, Vol. 1 at 77:22-25; 78:1-4; see also Blair, Vol. 1 at 138:23-25; 139:1-25; 140:1-17 (Ms. Blair has not reported non-work conversations that interfere with guest service to her supervisor and her other conversations have not interfered with guest service). Ms. Kastroll herself has never reported anyone for soliciting her while she was on duty. Kastroll, Vol. 1 at 100:3-10; see also Blair, Vol. 1 at 140:18-23 (Ms. Blair also understands employees are prohibited from selling products on the casino floor and has not reported violations of that policy). Furthermore, with the exception of the first written warning she received as set forth

below, Ms. Kastroll concedes Wynn did not discipline her for her alleged “40 conversations” she had with other security officers about the union, which conversations Ms. Kastroll admits did not last several minutes. Kastroll, Vol. 1 at 100:19-22; 101:9-12.

2. Ms. Kastroll’s Lengthy Solicitation to an On-Duty Security Officer.

Wynn hired Ms. Kastroll on April 20, 2005 and currently employs her as a table games dealer in Wynn’s Table Games Department. Kastroll, Vol. 1 at 27:15-19. As a table games dealer, Ms. Kastroll is responsible for dealing the game and all other functions associated with her assigned game, including providing positive guest interaction. Kastroll, Vol. 1 at 28:9-17; Blair, Vol. 1 at 121:24-25; 122:1-2. Ms. Kastroll typically works the day shift from 12:00 p.m. to 8:00 p.m.; however, on February 2, 2015, Ms. Kastroll was working earlier hours due to an increase in guests from the Super Bowl weekend. Kastroll, Vol. 1 at 39:24-25; 1-13.

On February 2, 2015, Ms. Kastroll approached an on-duty security officer, Johnny Moreno, on the casino floor. Kastroll, Vol. 1 at 38:17-23; 40:22-23; 98:19-22. Ms. Kastroll was headed downstairs to gather her personal belongs and to clock-out for the day. Kastroll, Vol. 1 at 42:5-6. Officer Moreno was stationed at Priority One Post (also known as “the crossroads”), which is located at the intersection of the Casino, the B-Bar, and the Host Office, the highest customer traffic area on property. Kastroll, Vol. I at 38:24-25; 39:1-2; 40:20-21. Priority One Post is considered the busiest post at Wynn and is the number one post for security and guest satisfaction because it is the one place in Wynn where everyone will walk by at one point or another during their experience at Wynn. Tourek, Vol. 2 at 214:15-24; Prescott, Vol. 2 at 294:2-4; Dudoit, Vol. 3 at 482:15-20; Moreno, Vol. 3 at 543:7-13. Priority One Post provides a panoramic view of everything that is going on with significant amounts of guest traffic. Tourek, Vol. 2 at 242:15-25; 243:1-4; Rankin, Vol. 3 at 442:2-15; Dudoit, Vol. 3 at 483:1-10. In addition

to guest traffic, approximately 130 to 150 table games dealers work on the main casino floor on an average day shift, along with 55 casino service team leads, and a number of other non-gaming employees such as cocktail servers, engineers, Public Area Department (“PAD”) employees, and security guards. Kastroll, Vol. 1 at 32:3-55; 33:1-3.

Security officers assigned to Priority One Post must direct guests and ensure casino security. Tourek, Vol. 2 at 187:3-12; 237:15-25; 238:1-2; Prescott, Vol. 2 at 294:11-13. Priority One Post is designed to be highly interactive with guests and visitors. R. Ex. 4; Rankin, Vol. 3 at 460:21-25; 461:1-25; 462:1-21. Security officers assigned to Priority One Post must be prepared to answer questions about both Wynn and Encore resorts, give detailed directions to guests and visitors, and assist guests in any way. Id. In addition to providing guest services, security officers assigned to Priority One Post must monitor the following locations for safety hazards, emergencies, guests needing assistance, and suspicious activities: the corridor towards Parasol Up; the corridor towards the Wynn Tower Suites, the corridor towards the Wynn Resort Elevators/Theater; the corridor towards the Buffet and Wynn Resort Pool Elevators; the B-Bar, the Casino Host Lounge; the area in front of the Main Cage; and the immediate casino/gaming area. Id. Ms. Kastroll knows and understands that security officers assigned to Priority One Post give directions to guests and answer a lot of questions. Kastroll, Vol. 1 at 41:14-16; 99:2-4.

Ms. Kastroll’s conversation with Officer Moreno occurred just before 5:00 p.m. Kastroll, Vol. 1 at 40:14-16. Officer Moreno did not personally know Ms. Kastroll, yet she approached him and encouraged and asked him to vote for the Security, Police, and Fire Professionals of America (“SPFPA”), which at the time was attempting to organize Wynn’s Security Department. Kastroll, Vol. 1 at 41:17-19; 43:6-25; 44:1-3; 97:20-24; Moreno, Vol. 3 at 545:19-25; 546:1. Officer Moreno did not engage in a back and forth discussion with Ms. Kastroll. Moreno, Vol. 3

at 546:2-3. Instead, Officer Moreno felt uncomfortable during her speech because he knew that he was on working time rather than on break time or outside of work. Moreno, Vol. 3 at 546:2-12.

Ms. Kastroll's lecture to Officer Moreno lasted approximately three (3) minutes. Kastroll, Vol. 1 at 44:4-6. While Ms. Kastroll engaged Officer Moreno, a significant number of guests and other employees passed by Officer Moreno's post. See generally GC Ex. 11; Kastroll, Vol. 1 at 88:21-24; 90:5-12; 98:23-25; 99:1; Tourek, Vol. 2 at 203:7-25; 204:1-14; 207:1-3. Many of the guests appeared to be in need of directions, but did not approach Officer Moreno as he was engaged by Ms. Kastroll. See, e.g., Tourek, Vol. 2 at 207:4-24; 208:6-25; 209:1-25; 210:1-25; 211:1-25; 212:1-25; 213:1-16; GC Ex. 11 at 16:58:13, 16:58:13, 16:58:35. At least one guest approached a different security officer, Joshua Browning, for assistance since he was momentarily in the vicinity and not otherwise engaged in conversation. GC Ex. 11 at 16:59:09; Tourek, Vol. 2 at 235:6-21.

After she concluded her solicitation of Officer Moreno, Ms. Kastroll proceeded downstairs to clock-out and go home for the day. Kastroll, Vol. 1 at 46:19-25. Once Ms. Kastroll left him alone, Officer Moreno was able to resume the performance of his duties in observing the casino for security threats and engaging guests. GC Ex. 11 at 17:01:07, 17:02:04, 17:02:19; Tourek, Vol. 2 at 235:22-25; 236:1-25; 237:1-10.

3. Wynn's Investigation of and Discipline for Ms. Kastroll's Conduct.

Another Security Officer, Joshua Browning, witnessed the interaction between Ms. Kastroll and Officer Moreno.² Kastroll, Vol. 1 at 44:17-25; 45:1-6; GC Ex. 13. Specifically, Officer Browning overheard Ms. Kastroll's solicitation, which lasted for about three (3) minutes.

²Officer Browning was not a member of management and had no supervisory authority in the Security Department. Tourek, Vol. 2 at 246:14-15.

Tourek, Vol. 2 at 176:20-25; 177:1-3; GC Ex.13. Officer Browning observed that the interaction was mainly one-sided, with Ms. Kastroll repeatedly telling Officer Moreno to “vote yes” for the SPFPA and with Officer Moreno merely responding “yes” when Kastroll asked him if he understood what she was saying. GC Ex. 13. Officer Browning immediately informed his supervisor, Brenda Rawlins of the interaction. GC Ex. 13. Additionally, Officer Browning informed Wynn’s President Maurice Wooden when Mr. Wooden happened to walk past him in the lobby. GC Ex. 13. Notably, however, Respondent never directed Officer Browning to observe and report Ms. Kastroll’s activities, and Mr. Tourek would have fired anyone who made such a request. Tourek, Vol. 2 at 234:20-25; 235:1.

Mr. Wooden asked former General Counsel for Wynn Las Vegas, LLC, Kevin Tourek,³ to participate in the investigation of Officer Browning’s report since it was a sensitive time due to the upcoming SPFPA election and because he wanted someone who would be cognizant of any legal repercussions when conducting the investigation. Tourek, Vol. 2 at 175:2-10; 230:15-25; 231:1-15. Notably, it is not atypical for Mr. Tourek to be involved in company investigations. Tourek, Vol. 2 at 175:11-14, 21-23; 229:16-22; 230:5-14. Moreover, as the alleged conduct involved two (2) different departments, Wynn’s Employee Relations Department, specifically Employee Relations Manager Courtney Prescott, handled the investigation rather than the Table Games Department. Kastroll, Vol. 1 at 54:11-15; see also Blair, Vol. 1 at 137:16-25 (noting other meetings where Ms. Blair served as a shop steward and Mr. Tourek and Ms. Prescott did not attend because the meetings only involved dealers and did

³At the time of his testimony, Mr. Tourek was the Global Compliance Officer for Wynn Resorts Limited, which is the ultimate parent company of Wynn Las Vegas, LLC. Tourek, Vol. 2 at 155:16-19. While Mr. Tourek was serving as the General Counsel for Wynn Las Vegas, LLC, half of his duties were labor and employment related and he was frequently involved in human resource/employee relations investigations. Tourek, Vol. 2 at 229:16-22.

not involve more than one department).

In the course of the investigation, Wynn representatives met with Officer Moreno and Officer Browning. Prescott, Vol. 2 at 269:11-19; Moreno, Vol. 3 at 546:4-12. With regard to Officer Browning, Ms. Prescott asked what he witnessed that led him to complain to his supervisor about a coworker. Prescott, Vol. 2 at 270:12-16. Officer Browning stated that he witnessed Ms. Kastroll approach a security officer at Priority One Post and engage him in a conversation that lasted several minutes during which Ms. Kastroll told the security officer that he needed to vote for the SPFPA and that they were there to protect him. Prescott, Vol. 2 at 270:18-25; 271:1-6. Officer Browning also provided a written statement about what he witnessed. GC Ex. 13; Prescott, Vol. 2 at 271:7-13.

Officer Moreno did not know who Ms. Kastroll was when she approached him without any prompting and encouraged him to vote for the SPFPA. Moreno, Vol. 3 at 545:19-25; 546:1. Wynn asked Officer Moreno to provide a written statement about what occurred on Priority One Post on February 2, 2015, which statement Officer Moreno submitted to Wynn. Prescott, Vol. 2 at 278:1-3; Moreno, Vol. 3 at 551:7-24; 552:1; GC Ex. 12. Since he remained at his post and the surveillance video footage showed that he did not instigate or encourage the conversation with Ms. Kastroll, Officer Moreno was not formally disciplined or threatened with discipline. Tourek, Vol. 2 at 252:17-21, 253:1-8; Moreno, Vol. 3 at 547:13-17.

Significantly, neither Mr. Tourek nor Ms. Prescott discussed the SPFPA with Officer Browning or Officer Moreno or how those security officers intended to vote in the SPFPA election; nor did they attempt to persuade the security officers to vote any particular way. Tourek, Vol. 2 at 180:13-15; 181:6-8; 234:10-19; 251:16-18; Moreno, Vol. 3 at 547:18-20. Furthermore, neither Mr. Tourek nor Ms. Prescott asked Officer Moreno if any other individuals

had reached out to him about the SPFPA. Moreno, Vol. 3 at 553:3-4.

As part of its investigation, Mr. Tourek and Ms. Prescott also met with Ms. Kastroll and Shop Steward Donna Blair. Kastroll, Vol. 1 at 47:4-25. In the course of the interview, Mr. Tourek informed Ms. Kastroll that she was caught on surveillance video talking to a security officer at the crossroads on February 2, 2015 between 4:00 and 6:00 p.m. Blair, Vol. 1 at 124:19-25; 125:1-20. Mr. Tourek attempted to refresh Ms. Kastroll's recollection of the incident a number of times, including describing the date, time, and location of the conversation. Blair, Vol. 1 at 124:17-25; 125:1-10. Mr. Tourek asked Ms. Kastroll if she believed her conversation on the casino kept the security officer from doing his job and informed Ms. Kastroll that a guest had to ask another nearby security officer a question because of her conversation with the security officer. Blair, Vol. 1 at 125:22-25; 126:1-4. Ms. Kastroll indicated that she could not really recall the interaction. See Blair, Vol. 1 at 125:9-10.

Ms. Prescott requested that Ms. Kastroll provide a written statement of her recollection of the conversation with Officer Moreno.⁴ Kastroll, Vol. 1 at 55:23-25. In her written statement, Ms. Kastroll deflected the truth about the length of the conversation by writing "At best...I may have wished someone a salutation such as 'good luck; we are praying for you!' I do not remember any lengthy conversation as I don't have time during my short break periods." GC Ex. 3. Mr. Tourek explained that Ms. Kastroll was in violation of Wynn's Solicitation and Distribution Policy. Kastroll, Vol. 1 at 52:20-22. Wynn also provided Ms. Kastroll with a copy of its Solicitation and Distribution Policy. Kastroll, Vol. 1 at 52:4-10; GC Ex. 2.

In response, Ms. Kastroll requested the prior versions of the Solicitation and Distribution

⁴In contrast to Ms. Kastroll's testimony, Union Shop Steward Donna Blair testified that Mr. Tourek asked Ms. Kastroll to prepare her written statement. Blair, Vol. 1 at 128:4-11.

Policy because she wanted to see “the difference in the language, where it has changed, and whether [she] was aware of whatever changes and modifications there were.” Kastroll, Vol. 1 at 52:18-25; 53:1-16. Notably, however, employees are responsible to know Wynn’s current policies and procedures because they are made available to all employees on Wynn’s intranet system known as the “WIRE,” which is accessible both at work and on their personal computers, and which allows employees to electronically acknowledge receipt of policies. Blair, Vol. 1 at 126:20-24; 141:1-21; 142:23-24; 143:1-4; May, Vol. 3 at 325:13-15; Marquez, Vol. 3 at 568:2-20; 619:21-25; 620:1-3; 628:22-25. Policies are only in effect until a new revision is issued and provided on the WIRE. Tourek, Vol. 2 at 165:7-10. As requested, Wynn subsequently provided copies of its prior versions of Wynn’s Solicitation and Distribution Policy to Ms. Kastroll. Kastroll, Vol. 1 at 65:10-15; GC Exs. 6-8.

Ultimately, Respondent issued Ms. Kastroll a first written warning on February 12, 2015 for her conduct in speaking with an on-duty security officer in a high traffic, guest facing area and violating Wynn’s Solicitation and Distribution Policy.⁵ Kastroll, Vol. 1 at 57:22-24; 58:11-13; GC Ex. 4; Prescott, Vol. 2 at 262:20-24; 307:25; 308:1-25. The first written warning issued to Ms. Kastroll specifically states:

On February 2, 2015, Kanie was witnessed and overheard having a conversation on the casino floor with a Security Officer regarding union organizing. This conversation happened while the officer was on duty (not on break) and in a high traffic, guest facing area. Kanie has been reminded of the Company’s Solicitation and Distribution Policy. Further violations of Company policy may lead to discipline up to and including termination of employment.

GC Ex. 4. Notably, the surveillance footage clearly depicts Ms. Kastroll engaging in a one-sided conversation with an on-duty security officer in the middle of the main thoroughfare while

⁵Ms. Kastroll’s union shop steward was present at the time she received her discipline. Kastroll, Vol. 1 at 58:24-25.

hundreds of guests constantly walk past them. See generally, GC Ex. 11. Ms. Kastroll indisputably distracted the on-duty security officer from performing his job duties while the security officer was posted at the most important security post given its casino security and guest relations responsibilities. Tourek, Vol. 2 at 186:13-25; 187:1-15; Prescott, Vol. 2 at 263:5-18; 264:10-25; 265:1-5; 293:18-22. The conversation initiated by Ms. Kastroll was not work-related and lasted approximately three (3) minutes.⁶ Tourek, Vol. 2 at 187:18-25; 188:1-7. Ms. Kastroll's conduct prevented Officer Moreno from performing his job duties while he was actively on work time.⁷ Tourek, Vol. 2 at 227:8-10.

III. ARGUMENT IN SUPPORT OF THE JUDGE'S DECISION AND RECOMMENDED ORDER.

A. The Judge Properly Determined that Ms. Kastroll Engaged in Prohibited Solicitation on February 2, 2015 (General Counsel's Exceptions 9, 10, 11, 12, 13, and 14).

As a threshold matter, General Counsel concedes that Wynn's Solicitation and Distribution Policy is lawful on its face and does not take exception to Wynn's policy. See General Counsel's Brief at 37. Instead, General Counsel asserts that Wynn applied its facially lawful solicitation policy to restrict Ms. Kastroll's Section 7 "union discussion" during which Ms. Kastroll talked about union organizing, supporting a union, and encouraging an on-duty security officer at the busiest intersection in the hotel to vote "yes" in the union representation election. See General Counsel's Brief at 37-38. In so doing, General Counsel disregards both

⁶Mr. Tourek pointed out that he needed to ask Ms. Kastroll what she was talking to Officer Moreno about because, if her conversation had been related to work, *e.g.*, stating that an individual needed to be watched for security purposes, an individual was in distress, etc., Respondent would not have disciplined Ms. Kastroll for seeking help from a security officer. See Tourek, Vol. 2 at 223:6-14.

⁷Officer Rankin admits that he has also been disciplined for non-work-related conversations while posted at Priority One Post. Rankin, Vol. 3 at 445:12-25; 446:1-14; 464:14-25; 465:1-6.

the applicable language and purpose of Wynn's written Solicitation and Distribution Policy and hopes to avoid the Board's longstanding recognition that "working time is for work."

As noted *supra*, Wynn maintains a written Solicitation and Distribution Policy, the purpose of which is to maintain a productive, efficient and clean work environment, as well as to minimize the potential of any disruption to Wynn's guests. GC Ex. 2. Per the policy, "solicitation by employees is prohibited in work areas *during the work time* of the employee initiating the solicitation or the employee being solicited." *Id.* [emphasis added]. With regard to General Counsel's exceptions, "solicitation" as defined in Wynn's lawful solicitation policy, is "oral communication *asking or seeking a person to take some action*, such as...*joining an organization*. It also includes requests for employees to sign Union authorization cards or representation petitions and the exchange of such documents for signature." *Id.*

Here, Ms. Kastroll violated both the express language of Wynn's Solicitation and Distribution Policy by oral communicating to Officer Moreno that he should take the action of voting "yes" in the union representation election, as well as the stated purpose of Wynn's policy, which seeks to maintain a productive, efficient work environment and to minimize the potential disruption to Wynn's guests when she solicited Officer Moreno who was actively posted at the busiest intersection of the hotel. While conversations about working terms and conditions between coworkers may be protected activity, conversations that take place while employees are on work time are not protected. Our Way, Inc., 268 N.L.R.B. 394 (1983) (noting that a rule prohibiting solicitation for any purpose on working time is presumptively lawful); Peyton Packing Co., Inc., 49 N.L.R.B. 828, 843 (1943) ("[t]he Act, of course, does not prevent an employer from making and enforcing reasonable rules covering the conduct of employees on company time. Working time is for work."). As aptly stated by the Judge, "[t]he whole point of

such rules is that these activities are a distraction or interruption of productive work, which the employer has a right to limit, so whether the solicitation involves the passing out of a card, or literature, or lengthy verbal enticement, it is still solicitation.” ALJD 25:18-21.

In this case, Ms. Kastroll approached Officer Moreno while he was actively stationed at Priority One Post. The purpose of having an officer present at that location is not only for the safety of all employees and guests and the security of Wynn assets, but also so that the security officer can direct traffic, answer questions, and provide guests with directions. The surveillance video in evidence clearly shows Ms. Kastroll and Officer Moreno at the “crossroads,” with numerous guests walking past them, including several guests who appear to be lost or in need of direction. At one point, another officer who just happened to be in the vicinity is required to assist a guest that would have otherwise been assisted by Officer Moreno. By engaging Officer Moreno to solicit him to vote for the SPFPA, Ms. Kastroll interfered with the performance of his job duties and diminished the quality of the guests’ experience. Consequently, Ms. Kastroll’s February 2, 2015 lecture to Officer Moreno constituted prohibited solicitation because it occurred while Officer Moreno was actively on work time at the busiest security post at Wynn.

The Judge also correctly noted that General Counsel confuses pro-union talk on the gaming floor – not an issue in this case – with Ms. Kastroll’s almost three minute solicitation of Officer Moreno to get him to vote “yes” in the representation election despite the fact that he was on duty, during work time, at Priority One Post. ALJD 31:12-14. In fact, Ms. Kastroll readily admitted that Wynn has never disciplined her for her “over 40” pro-union discussions that did not interfere with the job duties of other employees on working time. Kastroll, Vol. 1 at 100:19-22; 101:9-12 Accordingly, the Judge correctly distinguished the two different scenarios and properly found Ms. Kastroll engaged in prohibited solicitation on February 2, 2015.

B. The Judge Properly Determined that Wynn Did Not Interrogate Employees About Their Union Activity in Violation of Section 8(a)(1) of the Act (General Counsel's Exceptions 24 and 27).

General Counsel's exception alleging that Wynn unlawfully interrogated its employees with respect to their union activities was not substantiated by the evidence and was properly dismissed by the Judge. As the Judge explained in his Decision, the Board recognizes that employers have a legitimate business interest in investigating facially valid complaints relating to employee misconduct. See, e.g., Fresenius USA Mfg., Inc., 362 N.L.R.B. No. 130 (June 14, 2015) (post-Noel Canning decision stating that employer's investigation was consistent with its anti-harassment policies and therefore was related to its ability to effectively operate its business); see also Walmart Stores, Inc., Cases 16-CA-096240, JD-03-16, 2016 WL 737003 (N.L.R.B. Div. of Judges Jan. 21, 2016) (citing Fresenius and further noting that even if the alleged misconduct relates to the accused's Section 7 rights, Board law establishes that an employer may nonetheless discipline or discharge an employee if the misconduct is sufficiently egregious to remove the employee's activity from the Act's protection); Bridgestone Firestone South Carolina, 350 N.L.R.B. 526, 528-529 (2007) (holding that the employer lawfully questioned employee concerning his *alleged* violation of employer's no-profanity policy while engaging in union-related discussion); Consolidated Diesel Co., 332 N.L.R.B. 1019 (2000), enfd. 263 F.3d 345, 354 (4th Cir. 2001) (stating "if an employer is confronted with evidence of employee misconduct that could objectively be considered harassment, then the Act does not prevent the employer from investigating the matter further and taking necessary disciplinary action.").

Here, similar to the actions taken by the employer in Fresenius, Wynn did not unlawfully interrogate Ms. Kastroll, Officer Browning, or Officer Moreno in the course of its investigation

into Ms. Kastroll's misconduct. Wynn's representatives inquired as to Ms. Kastroll's conversation with Officer Moreno only *after* Officer Browning voluntarily reported what appeared to be a violation of Wynn policy and the disruption of guest services and the job duties of an on-duty security officer to his superiors. Officer Moreno was actively working at one of the busiest intersections in the casino, and the lengthy nature of the one-sided, non-work-related conversation by Ms. Kastroll – which spanned approximately three (3) minutes – violated Wynn policies. Accordingly, Wynn was legitimately and lawfully investigating a report of misconduct by a coworker. Walmart Stores, Inc., Cases 16-CA-096240, JD-03-16, 2016 WL 737003 (N.L.R.B. Div. of Judges Jan. 21, 2016) (“In light of those possibilities, it makes sense to afford employers some leeway to conduct an initial investigation and make an informed decision about whether the employee's alleged misconduct warrants disciplinary or other action, taking into account the employee's right to engage in Section 7 activity and other factors”).

Notably, Wynn followed its standard procedure for investigating and disciplining employees with respect to Ms. Kastroll. Specifically, Respondent's representatives interviewed the involved parties, allowed each party to present their side of the story, and reviewed all evidence, including the surveillance footage. Mr. Tourek's participation in the investigation was due to the sensitive timing and subject of the conversation and he was brought in to ensure that the investigation was compliant with the Act, and his attendance was consistent with other investigations carried out by Wynn. Additionally, Ms. Prescott from Wynn's Employee Relations Department was involved because the complaint involved two separate departments. Kastroll, Vol. 1 at 54:11-15; Blair, Vol. 1 at 137:16-25. Notably, Ms. Kastroll had a shop steward for each of her meetings with Wynn.

Finally, and perhaps most importantly of all, the Wynn representatives who performed

the investigation into Ms. Kastroll's conduct reasonably tailored their questions to the individuals involved in order to determine whether or not Ms. Kastroll's interference with Officer Moreno's job performance was related to work. Regarding Ms. Kastroll, Mr. Tourek clearly testified as to the basis of his questions, noting that that he needed to ask Ms. Kastroll what she was talking about with Officer Moreno because, if her conversation had been related to work (e.g., stating that an individual needed to be watched for security purposes, an individual was in distress, etc.), Respondent would not have disciplined Ms. Kastroll for seeking help from a security officer. See Tourek, Vol. 2 at 223:6-14. Moreover, neither Mr. Tourek nor Ms. Prescott discussed the SPFPA with Officer Browning or Officer Moreno or how those security officers intended to vote in the SPFPA election; nor did they attempt to persuade the security officers to vote any particular way. Tourek, Vol. 2 at 180:13-15; 181:6-8; 234:10-19; 251:16-18; Moreno, Vol. 3 at 547:18-20. Similarly, neither Mr. Tourek nor Ms. Prescott asked Officer Moreno if any other individuals had reached out to him about the SPFPA. Moreno, Vol. 3 at 553:3-4. Accordingly, as the evidence does not support the unlawful interrogation claim added by General Counsel at trial, that claim was properly dismissed.⁸

C. The Judge Properly Determined that Wynn Did Not Create the Impression of Surveillance of Ms. Kastroll's Union Activity (General Counsel's Exceptions 25, 26, and 30).

As set forth by the Judge, the "test for determining whether an employer has created an impression that its employee's protected activities have been placed under surveillance is 'whether the employees would reasonably assume from the employer's statements or conduct

⁸Despite alleging that Wynn unlawfully interrogated its employees, including Officer Browning, General Counsel notably failed to call Officer Browning as a witness to support such allegation. As a result, an adverse inference could be drawn against General Counsel regarding Wynn's interactions with Officer Browning or the allegation should be dismissed for failure to provide supporting evidence. See International Automated Machines, 285 N.L.R.B. 1122, 1123 (1987).

that their protected activities had been placed under surveillance.”” ALJD 32:24-28 (quoting Greater Omaha Packing Co., Inc., 360 N.L.R.B. No. 62, slip op. at 3 (2014), enfd. in part and rev’d in part by Greater Omaha Packing Co., Inc. v. NLRB, 790 F.3d 816 (8th Cir. 2015); Rood Industries, 278 N.L.R.B. 160, 164 (1986)). In making that determination, the essential focus is on the *reasonableness* of the employee’s assumption about whether the employer is monitoring their union or protected activities, with the critical element of *reasonableness* analyzed under an objective standard. Frontier Telephone of Rochester, Inc., 344 N.L.R.B. 1270, 1276 (2005).

In the present case, no evidence came before the Judge that would lead Ms. Kastroll to reasonably assume that her conduct had been placed under surveillance at Wynn. In particular, when Mr. Tourek and Ms. Prescott met with Ms. Kastroll and Shop Steward Donna Blair, they informed Ms. Kastroll that someone had complained about her interaction with the security guard and merely provided Ms. Kastroll with sufficient information about the misconduct in order to allow Ms. Kastroll to state, from her perspective, whether she had engaged in misconduct by disrupting another security office at the busiest security post in the hotel while the security officer was actively on duty. See Kastroll, Vol. 1 at 47:4-25; 49:8-25; Blair, Vol. 1 at 124:17-25; 125:1-25; 126:1-4. Nevertheless, despite the general information provided by Wynn and general questions asked of Ms. Kastroll, she indicated that she could not really recall the interaction. See Blair, Vol. 1 at 125:9-10. Nothing about the interaction between Wynn’s representatives and Ms. Kastroll would lead a reasonable employee to assume that she was being improperly surveilled by Wynn. Consequently, the Judge properly rejected the unsubstantiated allegation that Wynn created the impression of unlawful surveillance.

D. The Judge Properly Concluded that Wynn Did Not Promulgate a Discriminatory Directive that Employees Could Not Promote the Union at Work (General Counsel's Exception 28).

General Counsel's assertion that Wynn promulgated a discriminatory directive that employees could not promote the union at work is both misguided and unsupported by the evidence. As a threshold matter, Ms. Kastroll readily admitted as part of her testimony her knowledge of Wynn's prohibition against personal discussions that interfere with the performance of job duties and guest service and its allowance of personal conversations that do not create such disruptions. Specifically, Ms. Kastroll concedes she is knowledgeable regarding the fact that, on January 23, 2009, Regional Director Overstreet approved a settlement in Case No. 28-CA-022250 wherein Wynn agreed among other things to not stop its employees from talking about the union during work time while permitting talk about other non-work topics during work time *as long as their conversations did not interfere with or distract employees from the duties and responsibilities to Respondent's customers*. Kastroll, Vol. 1 at 51:4-16; 110:1-10; 112:24-25; 113:1-11.

Furthermore, all of Ms. Kastroll's interactions with Wynn's representatives were clearly focused on the fact that her conversation with Officer Moreno interfered with the performance of job duties of an employee actively on work time and violated Wynn's Solicitation and Distribution Policy. For example, as part of its investigation, Mr. Tourek and Ms. Prescott met with Ms. Kastroll and Shop Steward Donna Blair, during which Mr. Tourek asked Ms. Kastroll if she believed her conversation on the casino kept the security officer from doing his job and informed Ms. Kastroll that a guest had to ask another nearby security officer a question because of her conversation with the security officer. Blair, Vol. 1 at 125:22-25; 126:1-4. Ultimately, Wynn issued Ms. Kastroll a first written warning on February 12, 2015 for her conduct in

speaking with an on-duty security officer in a high traffic, guest facing area and violating Wynn's Solicitation and Distribution Policy. Kastroll, Vol. 1 at 57:22-24; 58:11-13; GC Ex. 4; Prescott, Vol. 2 at 262:20-24; 307:25; 308:1-25. The first written warning issued to Ms. Kastroll expressly states:

On February 2, 2015, Kanie was witnessed and overheard having a conversation on the casino floor with a Security Officer regarding union organizing. This conversation happened while the officer was on duty (not on break) and in a high traffic, guest facing area. Kanie has been reminded of the Company's Solicitation and Distribution Policy. Further violations of Company policy may lead to discipline up to and including termination of employment.

GC Ex. 4. Thus, both Wynn's discussions with Ms. Kastroll and the written warning itself clearly called to Ms. Kastroll's attention that her interaction with the on-duty security guard was a violation of policy. Such action by Wynn did not constitute a discriminatory directive that Ms. Kastroll was prohibited from discussing the union at work – something Ms. Kastroll admits to doing all the time without any threat of or imposition of discipline. See Kastroll, Vol. 1 at 100:19-22; 101:9-12.

E. The Judge Properly Concluded that Wynn Did Not Threaten Employees with Unspecified Reprisals (General Counsel's Exception 29).

Wynn did not threaten employees with unspecified reprisals. As set forth *supra*, when Wynn's representatives met with Ms. Kastroll to discuss her disruptive interaction with an on-duty security office, Mr. Tourek explained that Ms. Kastroll was in violation of Wynn's Solicitation and Distribution Policy. Kastroll, Vol. 1 at 52:20-22. As an employee of Wynn, Ms. Kastroll acknowledged receipt of and is responsible for knowing and adhering to all of Wynn's policies, which are made readily available to employees on the WIRE. Blair, Vol. 1 at 126:20-24; 141:1-21; 142:23-24; 143:1-4; May, Vol. 3 at 325:13-15; Marquez, Vol. 3 at 568:2-20; 619:21-25; 620:1-3; 628:22-25. Wynn also provided Ms. Kastroll with a copy of its Solicitation

and Distribution Policy. Kastroll, Vol. 1 at 52:4-10; GC Ex. 2. Wynn ultimately put Ms. Kastroll on very specific written notice that her conduct was unacceptable when it issued her a first written warning that clearly set forth her misconduct:

On February 2, 2015, Kanie was witnessed and overheard having a conversation on the casino floor with a Security Officer regarding union organizing. This conversation happened while the officer was on duty (not on break) and in a high traffic, guest facing area. Kanie has been reminded of the Company's Solicitation and Distribution Policy. Further violations of Company policy may lead to discipline up to and including termination of employment.

GC Ex. 4. On the other hand, since he remained at his post and the surveillance video footage showed that he did not instigate or encourage the conversation with Ms. Kastroll, Officer Moreno was not formally disciplined or threatened with discipline. Tourek, Vol. 2 at 252:17-21, 253:1-8; Moreno, Vol. 3 at 547:13-17.

Such action by Wynn belies General Counsel's argument that Wynn threatened Ms. Kastroll with unspecified reprisals. Mr. Tourek's attempt to put Ms. Kastroll "on notice" by describing the incident, asking Ms. Kastroll if she believed her conduct interfered with a security officer's job duties, and ultimately stating and providing in writing that Ms. Kastroll was in violation of Wynn's policies and that her disruptive behavior was not acceptable is clearly distinguishable from the vague "be careful" warnings considered to be unlawful. As a result, the Judge properly concluded that Wynn did not threaten any employees with unspecified reprisals.

F. The Judge Properly Discredited Ms. Kastroll's Dishonest Behavior During Her February 5, 2015 Meeting with Wynn (General Counsel's Exceptions 3 and 4).

General Counsel's exception to the Judge's finding that Ms. Kastroll is "evasive and not credible" and "not believable" with respect to certain portions of the evidence and that her written statement (G. Ex. 3) is "inaccurate, not credible, and rejected as a fabrication of facts in contrast to the overwhelming evidence of the February 2 incident" is wholly supported by the

testimony of witnesses, the weight of the respective evidence and established facts, and the reasonable inferences that may be drawn from the record as a whole. See ALJD 22:4-21; see also Double D Construction Group, 339 N.L.R.B. 303, 305 (2003); Daikichi Sushi, 335 N.L.R.B. 622, 623 (2001) (citing Shen Automotive Dealership Group, 321 N.L.R.B. 586, 589 (1996), enf'd. 56 Fed. Appx. 516 (D.C. Cir. 2003)). Indeed, as set forth *supra*, the documentary evidence, the testimony of Officer Moreno and others, and the surveillance footage all confirm that Ms. Kastroll engaged in a lengthy solicitation of Officer Moreno to vote “yes” in the union representation election while he was actively posted at Priority One Post and while significant numbers of guests and families pass by Officer Moreno. Moreover, in light of the overwhelming evidence demonstrating Ms. Kastroll’s violation of Wynn policy and Wynn’s appropriate response to the same, whether or not Ms. Kastroll truthfully recalled her solicitation of Officer Moreno on February 2, 2015 while he was on active duty, does not negate the Judge’s findings or his conclusion that Ms. Kastroll violated Wynn’s policy and that she was appropriately disciplined for the same.

G. The Judge Properly Found that Wynn Did Not Unlawfully Apply its Solicitation Policy to Ms. Kastroll’s Union Activity in Violation of Section 8(a)(1) of the Act (General Counsel’s Exceptions 31 and 32).

As Ms. Kastroll violated Wynn’s lawful Solicitation and Distribution Policy by soliciting Officer Moreno to vote “yes” in the union representation election while Officer Moreno was on active work time, the Judge properly held that Wynn did not unlawfully apply its policy to Ms. Kastroll. See GC Ex. 2; GC Ex. 4. The U.S. Supreme Court made clear in Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945), that the “purpose [of the Act] is the right of [employees] to organize for mutual aid without interference,” but that the Board must adjust that right to “the equally undisputed right of employers to maintain discipline in their establishments.” Republic

Aviation Corp., 324 U.S. at 798. The balance between employees’ right to organize and employers’ property rights “must be obtained with as little destruction of one as is consistent with the maintenance of the other.” NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 112 (1956).

To that end, the U.S. Supreme Court recognized:

The Act, of course, does not prevent an employer from making and enforcing reasonable rules covering the conduct of employees on company time. Working time is for work. It is therefore within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours. Such a rule must be presumed to be valid in the absence of evidence that it was adopted for a discriminatory purpose.

Republic Aviation, 324 U.S. at 803 and n.10 (quoting Peyton Packing Co., 49 N.L.R.B. at 843); see also Wah Chang Corp. v. N.L.R.B., 305 F.2d 15 (9th Cir. 1962) (quoting NLRB v. Essex Wire Corp., 245 F.2d 589, 593 (9th Cir. 1957) (“But working time is for work, and an employer is therefore entitled to prohibit union solicitation during working hours.”)).

Notably, the Judge struck the appropriate balance here between employee rights to organize and Wynn’s right to ensure that work time is used for work. In doing so, the Judge appropriately rejected General Counsel’s overbroad reading of Conagra Foods, Inc., 361 N.L.R.B. No. 113 (2014), and correctly reasoned, instead, that the key language from the Board in Conagra Foods, Inc. “is the balancing between individual or individuals being solicited and the potential for interference with employer productivity.” ALJD 25-26. While General Counsel argues that Ms. Kastroll did not “solicit” Officer Moreno because she did not present him with a union authorization card, such a narrow definition of solicitation was recently rejected as “patently unreasonable” by the Eighth Circuit Court of Appeals in Conagra Foods, Inc. v. NLRB, 813 F.3d 1079 (8th Cir. 2016). There, the Eighth Circuit Court held that such

a categorical rule is contrary to the Act’s policy of balancing the rights of employers and employees....Moreover, it would prevent employers from maintaining production and discipline. The likelihood of disruption from

solicitation does not arise solely from the possibility that an employee would be made to sign their name to a card. That likelihood exists because an entreaty from an organizer to support the union is inherently disruptive. The act of persuasion demands attention from the listener and draws attention away from production.

Conagra Foods, Inc., 813 F.3d at 1087-88; see also United States v. Kokinda, 497 U.S. 720, 734-35 (1990) (characterizing solicitation in the context of the First Amendment as disruptive because “one must listen, comprehend, decide, and act in order to respond to a solicitation”).

Moreover, the Board’s own decision in Conagra Foods, Inc., recognizes that the presentation of union authorization cards for signature is merely the usual form of solicitation. See Conagra Foods, Inc., 361 N.L.R.B. No. 113 at *2 (quoting W. W. Grainger, Inc., 229 N.L.R.B. 161, 166 (1977), enfd. 582 F.2d 1118 (7th Cir. 1978) (“‘[s]olicitation’ for a union *usually means* asking someone to join the union by signing his name to an authorization card at that time” [emphasis added])). On the other hand, as noted by the Eighth Circuit Court of Appeals in overturning Conagra Foods, Inc., the Board has *not* consistently held that the presentation of an authorization card for signature at the time of solicitation is required. See, e.g., Home Depot, U.S.A., Inc., 317 N.L.R.B. 732, 732-33, 736 (1995) (wearing a union button, asking employees if they had complaints about their job, and passing out business cards constituted solicitation); Uniflite, Inc., 233 N.L.R.B. 1108, 1109, 1111 (1977) (affirming an ALJ’s finding of solicitation where the solicitor discussed the union, stated he could get an authorization card, and suggested that more information could be obtained from the union organizing committee); The J.L. Hudson Co., 198 N.L.R.B. 172, 178 (1972) (affirming the ALJ’s finding that a 3-5 minute conversation informing employees that the union had obtained membership cards, asking if they signed one, and stating they ought to “was solicitation to union membership pure and simple”).

In other contexts, the Board has utilized the terms “solicit” and “solicitation” to describe

the act of asking an employee to vote a particular way in a union election. See, e.g., Southeastern Motor Truck Lines, Inc., 112 N.L.R.B. No. 78 (1955) (affirming the decision to set aside an election due in part to the company's interrogation of an employee and the fact that the company "**solicited** his vote against the Union" [emphasis added]); NLRB v. Clinchfield Coal Corp., 145 F.2d 66 (4th Cir. 1944) (affirming the Board's unfair labor determination against an employer that solicited votes in a collective bargaining election). After all, the commonly understood definition of "solicit" is to "ask for or try to obtain (something) from someone." *Solicit*, New Oxford American Dictionary (3d ed. 2010).

Here, Ms. Kastroll's interaction with Officer Moreno went beyond merely talking about the union – it was a three (3) minute call to action to join the SPFPA by voting "yes" in a union election made while Officer Moreno was on work time. Ms. Kastroll affirmatively sought to solicit a "yes" vote from Officer Moreno. Accordingly, Wynn acted within its rights to regulate Ms. Kastroll's conduct during work time as violative of its lawful Solicitation and Distribution Policy. Furthermore, even if this tribunal were to adopt the narrow definition of solicitation propounded by General Counsel, as noted *supra*, Wynn still acted appropriately in issuing Ms. Kastroll a first written warning because her conduct interfered with the job duties of a security officer on work time who should have been focused on providing guest service and ensuring casino security. See Conagra Foods, Inc., 813 F.3d at 1088-89 ("Accordingly, an employer may censure *any* discussion – about unions, the weather, or anything else – that is sufficiently disruptive...Of course, once it is determined that a statement or conversation is merely a discussion of unions, rather than a solicitation of union membership, the question of whether that statement or conversation is disruptive becomes determinative of whether the employer may censure it"). Consequently, as Wynn acted lawfully and within its rights in issuing Ms. Kastroll

a first written warning, affirming the dismissal of those claims as to Ms. Kastroll is warranted here.

H. The Judge Properly Determined that Wynn Did Not Discriminatorily Apply Its Solicitation Policy to Ms. Kastroll's Union Activity in Violation of Section 8(a)(1) and (3) of the Act (General Counsel's Exceptions 2, 5, 6, 7, 18, 19, 21, and 32).

Contrary to General Counsel's unsupported assertion that Wynn discriminatorily applied its Solicitation and Distribution Policy to Ms. Kastroll, the evidence presented to and admitted by the Judge demonstrated that Wynn evenly enforces its Solicitation and Distribution Policy when violations are brought to its attention. In fact, in the past two years, there have been three (3) incidents that resulted in written warnings to employees, including the first written warning that Wynn issued to Ms. Kastroll, which is the subject of this case. Prescott, Vol. 2 at 281:20-25; 282:1-4; GC Ex. 23; GC Ex. 24. For example, Wynn issued a first written warning to an employee after the employee requested that her coworker pay her to help her make a duvet. GC Ex. 23. Similarly, Wynn issued a second written warning to another employee for attempting to sell Avon products at Wynn. GC Ex. 24. Wynn imposed the disciplines regardless of whether or not there was an active union campaign. Notably, General Counsel failed to put forth any evidence that Wynn has ever failed to discipline an employee for violations of its Solicitation and Distribution Policy when it has been made aware of such a violation. As a result, the evidence clearly demonstrated that Wynn uniformly applies its Solicitation and Distribution Policy.

From a broader standpoint, as demonstrated by the evidence and found by the Judge, Wynn also consistently disciplines employees for personal conversations – regardless of content – when such conversations distract other employees from performing their job duties or interfere with guest services and when such conduct is brought to Wynn's attention. See, e.g., R. Exs. 13-

14; Creer, Vol. 3 at 611:20-25; 612:1-23; ALJD 12:34-37; 27:13-16. For example, in the recent past Wynn disciplined employees for such things as: speaking to coworkers instead of serving guests (R. Ex. 14 at 2:11); ignoring security post duties while talking with another employee (R. Ex. 14 at 2:13); ignoring the supervision of games due to conversations with another employee (R. Ex. 14 at 3:16); engaging in a personal conversation about 1970s and 1980s pornography stars that was overheard by guests (R. Ex. 14 at 5:22; 6:24-25); failing to greet a guest because the employee was engaged in a conversation with a coworker (R. Ex. at 7:27); failing to serve guests due to conversations with a coworker (R. Ex. 14 at 8:28, 31); and neglecting duties while engaged in personal conversations with coworkers (R. Ex. 14 at 12:40, 42, 44). Once again, Wynn imposed the disciplines regardless of whether or not there was an active union campaign. Further, the General Counsel fails to put forth any evidence that Wynn treats certain subjects of personal conversation more favorably than others when such conversation interfere with business operations and customer service. Instead, the evidence clearly demonstrates that, when Wynn is made aware of the misconduct, it uniformly acts to remind employees that their personal conversations cannot interfere with business operations or customer service.

With regard to the February 2, 2015 incident at issue, Ms. Kastroll was caught on surveillance video approaching and conversing with a security officer for approximately three (3) minutes while he should have been engaged in assisting guests with directions and ensuring the security of the casino and surrounding areas. Due to Ms. Kastroll's conduct, Officer Moreno was unable to fulfill his duties during that three (3) minute period of time. Wynn did not discipline Ms. Kastroll for engaging in protected, concerted activity in violation of the Act; instead, as captured on surveillance footage, Wynn disciplined Ms. Kastroll for interfering with guest service and Officer Moreno's job duties while Officer Moreno was on work time.

Consequently, Wynn demonstrated its legitimate bases for disciplining Ms. Kastroll after she approached a security officer on work time and distracted him from performing his duties at Priority One Post on February 2, 2015. The Judge's finding in that regard should not be disturbed.

I. The Judge Properly Applied Wright Line (General Counsel's Exceptions 2, 15, 16, 17, 20, 21, and 32).

It is well-established that the Board applies the burden-shifting framework first adopted in Wright Line, 251 N.L.R.B. 1083, 1089 (1980), enfd., 662 F.2d 899 (1st Cir. 1981), and later endorsed by the Supreme Court in NLRB v. Transportation Management, 462 U.S. 393, 401-03 (1983), to determine whether an employer violated the Act by disciplining an employee. See NLRB v. Mike Yurosek & Son, Inc., 53 F.3d 261, 267 (9th Cir. 1995). According to the Wright Line burden shifting framework, to sustain an unfair labor practice charge, General Counsel has the burden of proving a *prima facie* case by showing that the employee's alleged protected activity was a "substantial or motivating factor" in the decision to discipline her. Mike Yurosek & Son, Inc., 53 F.3d at 267 (quoting NLRB v. Howard Elec. Co., 873 F.2d 1287, 1290 (9th Cir. 1989)).

The elements required to support a showing of discriminatory motivation are: (1) protected, concerted activity, (2) employer knowledge, (3) timing, and (4) employer animus. General Counsel must prove not only that the employer knew of the employee's protected, concerted activities, but also that the timing of the alleged reprisal was proximate to the protected activities and that there was animus to link the factors of timing and knowledge to the improper motivation. See New York University Medical Center, 324 N.L.R.B. 887, 900 (1997) (citing Hall Construction v. NLRB, 941 F.2d 684 (8th Cir. 1991), and Service Employees Local 434-B, 316 N.L.R.B. 1059 (1995)); see also United Federation of Teachers Welfare Fund, 322 N.L.R.B.

385, 392 (1996) (stating that General Counsel is required to prove the timing of the alleged reprisal was proximate to protected activities). If such unlawful motivation is shown, the burden of persuasion shifts to the employer to prove its affirmative defense that the alleged discriminatory conduct would have taken place even in the absence of the protected activity. See Excel Corporation, 324 N.L.R.B. 416, 420 (1997); New York University Medical Center, 324 N.L.R.B. at 900. Nevertheless, the ultimate burden of proof always remains with General Counsel throughout the proceedings and does not shift to the respondent. The New Otani Hotel and Garden, 325 N.L.R.B. 928, 938 (1998).

In the present case, the Judge properly found that Ms. Kastroll did not engage in protected, concerted activity in view of the fact that she was in violation of Wynn's lawful Solicitation and Distribution Policy and that her conduct improperly interfered with Wynn's business operations and guest service. Despite that dispositive finding, the Judge continued his analysis and appropriately found that, even if Ms. Kastroll's actions could be considered protected, concerted activity, Wynn still acted lawfully by disciplining Ms. Kastroll for her lengthy, disruptive solicitation of an on-duty security officer stationed at the busiest post on property and did so without any union animus.

As a threshold matter, General Counsel provided no evidence that Wynn harbored or acted with any union animus. Indeed, General Counsel noticeably misconstrues Mr. Tourek's testimony in an effort to erroneously argue that Wynn's discipline was motivated by an anti-union animus. Significantly, Mr. Tourek made clear in his testimony that the reference to Ms. Kastroll's discussions about the union was merely a fact showing that her lengthy solicitation of Officer Moreno was not work-related. Mr. Tourek expressed that if Ms. Kastroll's conversation had been related to work (*e.g.*, stating that an individual needed to be watched for security

purposes, an individual was in distress, etc.), Wynn would not have disciplined Ms. Kastroll for seeking help from a security officer. See Tourek, Vol. 2 at 223:6-14.

In reality, the evidence demonstrates that Wynn enjoys good relationships with the unions representing its workforce and that its employees are free to choose for themselves whether to seek representation by a union. See, e.g., Tourek, Vol. 2 at 180:13-15; 181:6-8; 232:12-25; 233:1-12; 234:5-19; 251:16-18; Moreno, Vol. 3 at 547:18-20; 553:3-4; NLRB v. Brown, 380 U.S. 278, 289 (1965) (citing to the employer's "more than amicable" relationship with the union in finding insufficient evidence of union animus by the employer). Furthermore, the evidence demonstrates that Wynn acted solely with the legitimate business interest of maintaining proper casino security and guest services by ensuring that employees are able to perform their job duties while on work time. Absent evidence of animus, the *prima facie* case falls flat and General Counsel fails to sustain its burden of proof on the 8(a)(3) allegation. Columbian Distribution Servs., Inc., 320 N.L.R.B. 1068, 1071 (1996).

As clearly demonstrated by the testimony of the decision makers who issued the first written warning to Ms. Kastroll, and as expressly set forth on the first written warning itself, Wynn disciplined Ms. Kastroll because her conduct indisputably interfered with the job duties of a security officer who was actively on work time and violated Respondent's Solicitation and Distribution Policy by encouraging the security office to vote "yes" in the then-pending union election while the officer was actively on work time. See, e.g., GC Ex. 4; Tourek, Vol. 2 at 187:13-21; Prescott, Vol. 2 at 263:2-25; 264:1-25; 265:1-5. Furthermore, as accurately stated by the Judge, Wynn "disciplines its employees for personal conversations – regardless of content – when such conversations distract other employees from performing their job duties or interfere with guest services and when such conduct is brought to Respondent's attention, as done here."

ALJD 27:13-16. Consequently, as Wynn would have disciplined Ms. Kastroll for her disruptive behavior regardless of the non-work-related subject matter of the conversation, Wynn acted lawfully. Thus, notwithstanding Ms. Kastroll's allegation that Wynn interfered with her union activities by issuing her a first written warning, the evidence presented to the tribunal demonstrates that Wynn's actions did not violate the Act, but were instead based on legitimate, non-discriminatory business reasons.

J. The General Counsel Withdrew the Allegation that Officer Browning Engaged in Surveillance (General Counsel's Exceptions 22 and 23).

Wynn does not dispute that General Counsel withdrew the allegation from the Consolidated Complaint that Officer Browning was an agent of Wynn and that by standing beside employees and eavesdropping on their conversations he engaged in surveillance of their union activities. See GC Ex. 1(o), para. 5(e); Tr. 312. Accordingly, no ruling by the Judge was necessary on that issue. Nevertheless, regardless of General Counsel's withdrawal of that issue, the Judge properly found that Wynn acted appropriately with regard to Ms. Kastroll in all other respects. Accordingly, those determinations should not be disturbed and the Judge's findings, determinations, conclusions, and Recommended Order as to Ms. Kastroll should be adopted by the Board.

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IV. CONCLUSION.

For the aforementioned reasons, the Board should deny General Counsel's exceptions and should affirm the Judge's rulings, findings, and conclusions and adopt the recommended order as they pertain to Ms. Kastroll.

DATED this 28th day of November, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 28, 2016, I did serve a copy of the foregoing
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COUNSEL'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION
AND RECOMMENDED ORDER** upon:

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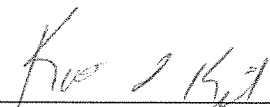
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